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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

BERNADINE GRIFFITH, et al,

Plaintiffs,

vs.

TIKTOK, INC, a corporation;
BYTEDANCE, INC., a corporation,

Defendants.

CASE NO. 5:23-cv-00964-SB-E

DISCOVERY MATTER

**JOINT STIPULATION
REGARDING PLAINTIFFS'
MOTION TO COMPEL
REGARDING PRIVILEGE ISSUES**

Magistrate Judge: Hon. Charles Eick
Date: November 1, 2024
Time: 9:30 AM
Place: Ctrm. 750

Action Filed: May 26, 2023
Trial Date: Januarv 21. 2025

TABLE OF CONTENTS

1		
2		
3	I.	PRELIMINARY STATEMENTS 1
4	A.	PLAINTIFFS’ PRELIMINARY STATEMENT..... 1
5	B.	DEFENDANTS’ PRELIMINARY STATEMENT.....4
6	II.	RELEVANT BACKGROUND.....6
7	A.	PLAINTIFFS’ BACKGROUND.....6
8	B.	DEFENDANTS’ BACKGROUND.....8
9	III.	LEGAL STANDARD 11
10	A.	PLAINTIFFS’ STANDARD 11
11	B.	DEFENDANTS’ STANDARD 13
12	IV.	ARGUMENT 14
13	A.	PLAINTIFFS’ ARGUMENT 14
14	1.	Defendants Waived Any Applicable Privilege by Failing to
15		Produce Logs in a Timely Manner. 14
16	2.	Defendants Failed to Provide Logs for Certain Redactions and
17		Thus Waived Privilege. 16
18	3.	Defendants’ Descriptions of Privilege Are Patently Insufficient
19		and Do Not Enable Plaintiffs to Assess the Claims. 17
20	4.	Improper or Unjustified Redactions Do Not Bear Any Facial
21		Indicia of Privileged Materials. 19
22	a.	Documents that Do Not Involve an Attorney 19
23	b.	Documents that Involve an Attorney but Relate to
24		Business, Not Legal Matters21
25	5.	Defendants’ Clawback Attempt Is Improper.....28
26	B.	DEFENDANTS’ ARGUMENT28
27	V.	CONCLUSION36
28	A.	PLAINTIFFS’ CONCLUSION36
	B.	DEFENDANTS’ CONCLUSION36

TABLE OF AUTHORITIES

Page(s)

Cases

<i>In re Abilify (Aripiprazole) Prod. Liab. Litig.</i> , 2017 WL 6757558 (N.D. Fla. Dec. 29, 2017).....	14, 20, 33, 34
<i>Am. Fed’n of Musicians v. 212 Prods. LLC</i> , 2022 WL 2102868 (C.D. Cal. Sep. 27, 2021).....	13
<i>Anaya v. CBS Broad., Inc.</i> , 251 F.R.D. 645 (D.N.M. 2007)	14, 29
<i>Applied Med. Resources Corp. v. Ethicon, Inc.</i> , 2005 WL 6567355 (C.D. Cal. May 23, 2005).....	13
<i>Baxter Healthcare Corp. v. Fresenius Med. Care Holding, Inc.</i> , 2008 WL 5214330 (N.D. Cal. Dec. 12, 2008)	12, 20
<i>Brunswick Corp. v. Doff</i> , 638 F.2d 108 (9th Cir. 1981).....	12
<i>Bullion Monarch Mining, Inc. v. Newmont USA Ltd.</i> , 271 F.R.D. 643 (D. Nev. 2010)	29
<i>Burlington N. & Santa Fe R.R. Co. v. U.S. Dist. Court</i> , 408 F.3d 1142 (9th Cir. 2005).....	14, 29, 31
<i>Calendar Research LLC v. Stubhub, Inc.</i> , 2019 WL 1581406 (C.D. Cal. Mar. 14, 2019)	14, 29
<i>Centerline Hous. P’ship I, L.P.-Series 2 v. Palm Communities</i> , 2021 WL 4895746 (C.D. Cal. Sept. 2, 2021).....	12, 21, 34
<i>Clavo v. Zarrabian</i> , 2003 WL 24272641 (C.D. Cal. Sep. 24, 2003).....	22
<i>Fidelity Nat. Title Ins. Co. v. Captiva Lake Investments, LLC</i> , 2012 WL 3562207 (E.D. Mo. Aug. 17, 2012)	15, 17, 29, 31
<i>Genentech, Inc. v. Trustees of Univ. Pennsylvania</i> , 2011 WL 5079531 (N.D. Cal. Oct. 24, 2011).....	27, 35

1	<i>Gibson v. Reed,</i>	
2	2019 WL 2372480 (W.D. Wash. June 5, 2019).....	14
3	<i>In re Google RTB Consumer Priv. Litig.,</i>	
4	2022 WL 17072016 (N.D. Cal. Nov. 17, 2022).....	20, 33
5	<i>In re Human Tissue Prod. Liab. Litig.,</i>	
6	2009 WL 1097671 (D.N.J. Apr. 23, 2009).....	28, 35
7	<i>Humphreys v. Regents of the Univ. of California,</i>	
8	2006 WL 1409336 (N.D. Cal. May 23, 2006)	14
9	<i>Johnson v. Ford Motor Co.,</i>	
10	309 F.R.D. 226 (S.D. W.Va. 2015).....	12
11	<i>LD v. United Behav. Health,</i>	
12	2022 WL 4878726 (N.D. Cal. Oct. 3, 2022).....	14
13	<i>Leonen v. Johns-Manville,</i>	
14	135 F.R.D. 94 (D.N.J. 1990)	22
15	<i>Maki v. United States,</i>	
16	2008 WL 1756330 (W.D. Va. Apr. 16, 2008).....	12
17	<i>Mayorga v. Ronaldo,</i>	
18	2023 WL 8047781 (9th Cir. Nov. 21, 2023).....	13
19	<i>Munguia-Brown v. Equity Residential,</i>	
20	337 F.R.D. 509 (N.D. Cal. 2021)	14
21	<i>In re Napster, Inc., Copyright Litig.,</i>	
22	2005 WL 6569723, . (N.D. Cal. Apr. 12, 2005), <i>rev'd on other</i>	
23	<i>grounds</i> , 479 F.3d 1078 (9th Cir. 2007).....	22
24	<i>Phillips v. C.R. Bard, Inc.,</i>	
25	290 F.R.D. 615 (D. Nev. 2013).....	22
26	<i>Robinson v. Texas Auto. Dealers Ass'n,</i>	
27	214 F.R.D. 432 (E.D. Tex. 2003), <i>rev'd on other grounds</i> ,	
28	2003 WL 21911333 (5th Cir.).....	15, 17, 29, 31
	<i>S.E.C. v. Yorkville Advisors, LLC,</i>	
	300 F.R.D. 152 (S.D.N.Y. 2014).....	19, 32

1	<i>In re Telescopes Antitrust Litig.</i> ,	
2	2022 WL 17331257 (N.D. Cal. Nov. 29, 2022).....	20, 33
3	<i>United States v. Chen</i> ,	
4	99 F.3d 1495 (9th Cir. 1996).....	13
5	<i>United States v. Chevron Corp.</i> ,	
6	1996 WL 264769 (N.D. Cal. Mar. 13, 1996).....	13, 22, 23
7	<i>United States v. Chevron Texaco Corp.</i> ,	
8	241 F. Supp. 2d 1065 (N.D. Cal. 2002).....	22
9	<i>United States v. Martin</i> ,	
10	278 F.3d 988 (9th Cir. 2002).....	11, 12
11	<i>United States v. Union Pac. R. Co.</i> ,	
12	2007 WL 1500551 (E.D. Cal. May 23, 2007).....	13, 14
13	<i>Urban Box Office Network, Inc. v. Interfase Managers, L.P.</i> ,	
14	2006 WL 1004472 (S.D.N.Y. Apr. 18, 2006).....	22
15	<i>Veolia Water Sols. & Techs. Support v. Siemens Indus., Inc.</i> ,	
16	63 F. Supp. 3d 558 (E.D.N.C. 2014).....	28, 35
17	<i>In re Viaxx Prod. Liab. Litig.</i> ,	
18	501 F. Supp. 2d 789 (E.D. La. 2007).....	28, 35
19	<i>Victor Stanley, Inc. v. Creative Pipe, Inc.</i> ,	
20	250 F.R.D. 251 (D. Md. 2008).....	12
21	<i>Visa U.S.A., Inc. v. First Data Corp.</i> ,	
22	2004 WL 1878209 (N.D. Cal. Aug. 23, 2004).....	22, 25
23	<i>Wisk Aero LLC v. Archer Aviation Inc.</i> ,	
24	2022 WL 524065 (N.D. Cal. Feb. 22, 2022).....	13
25	Rules	
26	Fed. R. Civ. P. 26.....	<i>passim</i>
27	Fed. R. Civ. P. 34.....	15
28		

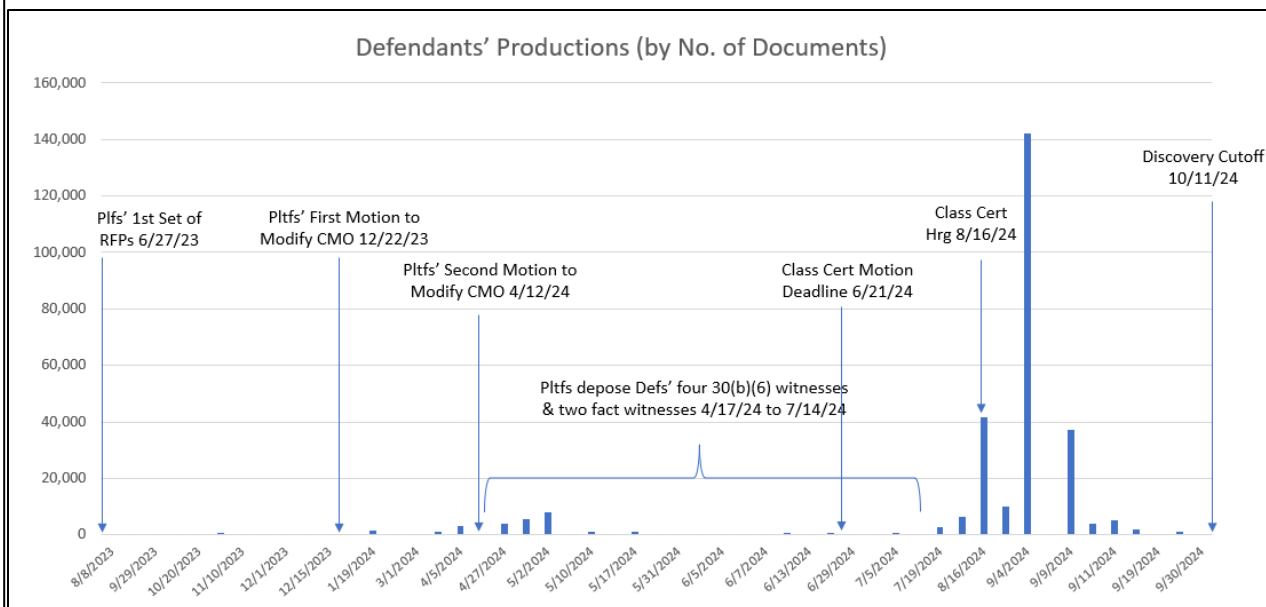
1 **I. PRELIMINARY STATEMENTS**

2 **A. PLAINTIFFS' PRELIMINARY STATEMENT**

3 Plaintiffs bring this motion to address Defendants' improper withholding and
4 redaction of documents based on vague, sweeping claims of privilege and inadequate
5 privilege and redaction logs. The summary judgment deadline is November 1, 2024,
6 and this motion is brought against a background of massively delayed discovery by
7 Defendants. Back in April 2024, to forestall a motion to compel production of their
8 custodial documents, Defendants reached an agreement with Plaintiffs. That
9 agreement was laid out in Plaintiffs' motion to modify the case schedule (Dkt. 134 at
10 10-12, 13-14), and Plaintiffs relied on Defendants' agreement in taking depositions,
11 developing expert testimony, moving for class certification, and preparing for
12 summary judgment and trial.

13 Among other things, Defendants agreed (1) "to produce [their] custodians'
14 documents in the ordinary course and *not wait for a last-minute document dump*,"
15 (2) "to make all reasonable efforts to *produce documents in approximately equal*
16 *increments* every three weeks," (3) "to ensure that documents Plaintiffs wish to
17 prioritize are *not withheld until the end*," (4) to adhere to a "*substantial completion*
18 *date for production of documents at least one month prior to the fact discovery*
19 *cutoff*," and (5) "to make all reasonable efforts to produce all such documents [for a
20 custodian being deposed] at least one week prior to such custodian's deposition." Dkt.
21 134 at 13-14 (emphasis added).

22 Defendants did not abide by any part of this agreement. Defendants' document
23 production has been heavily backloaded, with more than 85% of their documents
24 produced in the last month and a half, *after* the class certification hearing—the very
25 definition of a "last-minute document dump." And Defendants continue to produce
26 documents, with the most recent production coming on September 30, 2024, three
27 days before Plaintiffs provided their portion of this Joint Stipulation. Linkh Decl.
28 ¶¶ 13-16. This chart illustrates the timing of Defendants' document production:



As late as Defendants have been in producing documents, they have been even tardier in providing privilege and redaction logs. As of the date Plaintiffs provided their portion of this Joint Stipulation to Defendants, Defendants' last privilege log entry, served June 17, 2024, was for TIKTOK-BG-000153024, *see* Ex. 2 at 26. Since then, Defendants have produced **2.9 million pages** without logging a single document withheld from that giant production. Similarly, Defendants' latest redaction log entry was for TIKTOK-BG-000220390, i.e., **2,859,755 pages ago** (out of a total production of 3,080,145 pages). Ex. 3 at 26; Linkh Decl. ¶ 16. Even if Defendants produce logs after Plaintiffs' portion of this Joint Stipulation is provided, they will be untimely and impracticably late for Plaintiffs to analyze and challenge. This is exactly why the parties agreed that Defendants would not wait to dump documents on Plaintiffs at the last minute; Defendants' brazen violation of that agreement has left Plaintiffs with insufficient opportunity to review not only the documents but also the corresponding privilege and redaction logs that will follow the eleventh-hour dumps.

The purpose of providing logs is to enable the receiving party to assess and, where appropriate, challenge the producing party's withholding of documents. Defendants' conduct is a transparent attempt to run out the clock before the October 11 discovery cutoff and prevent Plaintiffs from challenging their privilege assertions

1 and redactions. Plaintiffs’ challenges and requested remedies fall into five categories:

2 First, Defendants have failed to produce logs corresponding with the vast
3 majority of their productions. While Defendants recently informed Plaintiffs that they
4 would attempt to provide logs the week of October 7, such logs would arrive too late
5 and provide inadequate time for Plaintiffs to review them and raise appropriate
6 challenges. Plaintiffs thus request an order that Defendants, by waiting until the very
7 last week of fact discovery to serve logs, have waived any protections for documents
8 withheld or redacted without a log entry as of October 3, 2024.

9 Second, Defendants have not provided redaction logs for certain redacted
10 documents. Plaintiffs request an order that Defendants waived any protections for
11 these redactions and that the documents be produced in unredacted form.

12 Third, the limited set of timely logged documents contains hundreds of suspect
13 entries with inadequate descriptions of privilege that leave Plaintiffs unable to
14 evaluate the propriety of Defendants’ withholding. In fact, Defendants’ logs do not
15 even have a “recipient” column to indicate the recipient of purportedly privileged
16 communications. *See* Exs. 2, 3. Further, many entries identify no lawyer at all—not
17 as an author or in the privilege description (and necessarily not as a recipient because
18 there are no recipient columns at all). For such entries that identify no lawyer and lack
19 adequate descriptions, Plaintiffs request that the privilege be deemed waived and the
20 underlying documents be produced.

21 Fourth, Defendants have made redactions, with insufficient justification, on
22 documents that bear no facial indicia that the redacted material contains attorney-
23 client communications. Plaintiffs respectfully ask the Court to conduct an *in camera*
24 review of 16 exemplar documents and order Defendants to produce any documents it
25 finds to have been improperly withheld. *See* Ex. 9 (chart of 16 documents); *see also*
26 Exs. 12-13, 15-16, 19-26, 29-32.

27 Finally, Defendants have sought to claw back a document that is patently not
28 privileged. Plaintiffs request a declaration that the clawback attempt is improper.

1 **B. DEFENDANTS’ PRELIMINARY STATEMENT**

2 Replaying a scene this Court has seen many times before, Plaintiffs’ motion
3 seeks inappropriate relief and overstates the dispute. Since December 2023,
4 Defendants have produced over 280,000 documents and served 13 privilege and
5 redaction logs. Despite this diligence, Plaintiffs request a finding of privilege waiver
6 plus *in camera* review of sixteen documents, relying on unsupported theories,
7 inapposite case law, and reviving already-rejected grievances. But stripped of
8 hyperbole, Plaintiffs’ motion is largely moot. All five of the issues on which Plaintiffs
9 have moved are, or soon will be, resolved, with minor exceptions in areas where
10 Plaintiffs’ position is so extreme that compromise is impossible.

11 **Issue #1, Purported Failure to Produce Privilege Logs: Moot.** Plaintiffs
12 charge that Defendants “failed to produce logs corresponding with the vast majority
13 of their productions” (Br. at 3) (category one), but on October 10, 2024, Defendants
14 provided a privilege log for every withheld document identified from these
15 productions. Defendants expect to produce the corresponding redaction log
16 imminently. Plaintiffs admit they were aware these logs were forthcoming but sought
17 court intervention anyway. Br. at 10 (Defendants told Plaintiffs on September 30 they
18 expected to provide logs “the week of October 7”). Plaintiffs claim the logs are being
19 provided “too late” and with “inadequate time,” but there is nothing “late” about
20 them. According to Plaintiffs, Defendants produced “2.9 million pages” of
21 nonprivileged documents in the last few months. Br. at 2. Defendants reviewed and
22 logged documents for privilege from this population as expeditiously as possible but
23 given the volume—the result of Plaintiffs’ demand for dozens of complex search
24 strings run across more than thirty custodians—it has simply taken time. The logs
25 were (or will be) served shortly after the documents were reviewed for
26 privilege. Regardless, even lateness would not automatically result in waiver.

27 **Issue #2 and #3, Redactions & Recipient Information Purportedly Missing**
28 **from Logs: Moot.** Plaintiffs’ forthcoming redaction log will also contain entries

1 addressing Plaintiffs’ second, and most of their third, categories. Plaintiffs identified
2 certain redactions they claimed were “never logged” (category two); the documents
3 are either ones inadvertently omitted from prior logs due to technical or vendor error,
4 or redacted Lark chats Defendants already logged but which Plaintiffs requested be
5 reproduced in a different format. Supplemental entries for all such redactions will
6 appear on the upcoming log.

7 Plaintiffs also fault Defendants’ privilege log for not containing a “Recipients”
8 column (category three), but supplemental “recipient” information was provided in
9 Defendants’ October 10 log. Defendants offered to produce it months ago, an offer
10 to which Plaintiffs did not respond. Defendants further agree, voluntarily, to supply
11 as soon as possible attorney identification for entries not otherwise referencing a
12 lawyer following this supplementation where possible after a reasonable search,
13 including “Legal” where applicable. Plaintiffs’ other arguments, that certain
14 narratives are too vague, that documents logged on work product grounds must name
15 a specific litigation or trial, and/or that references to “Legal” are deficient, likewise
16 fail. Defendants even provided Plaintiffs with authority on the latter point at the end
17 of August, which Plaintiffs ignored. Plaintiffs’ own cited cases also indicate that the
18 remedy, if any, is supplementing the log, not waiver. Defendants have done that or,
19 in the case of additional attorney names, expect to do so imminently.

20 **Issue #4, Plaintiffs’ Request for *In Camera* Review of 16 Documents: Moot**
21 **or Meritless.** Plaintiffs claim Defendants over-redacted sixteen documents out of
22 hundreds of thousands produced (category four). Defendants were in the process (as
23 they informed Plaintiffs) of further assessing the privilege claims when Plaintiffs
24 served this stipulation prematurely. Defendants agree to produce three of the sixteen
25 documents with fewer or no redactions and expect to do so by October 14. Plaintiffs
26 raise no valid argument with respect to the remaining thirteen, for which they are not
27 entitled to *in camera* review.

1 **Issue #5, Clawback Request: Moot.** Defendants have agreed to withdraw
2 their clawback request for portions of Wong Exhibit 10 (category five). Except as
3 regards Plaintiffs’ legal contentions concerning privilege for “technical” documents
4 and/or between in-house counsel and employees of a company (see *infra* at pp. 23,
5 29), Defendants do not further address Plaintiffs’ fifth category.

6 This motion, one of five Plaintiffs filed after the denial of class certification,
7 is their latest effort to throw spaghetti at the wall with hopes that something will
8 stick. Plaintiffs purport to lack information they need to “assess and, where
9 appropriate, challenge the producing party’s” assertion of privilege (Br. at 2), but by
10 their own admission have no interest in obtaining it. Instead, Plaintiffs demand a
11 sweeping holding of waiver—an outsized penalty that does not correlate to the
12 purported shortcomings. Plaintiffs’ attempt to shoehorn in unfounded assertions
13 regarding “delayed discovery,” “last-minute,” and “eleventh-hour” document dumps
14 (Br. at 1-2), are lifted from Plaintiffs’ motion to modify the Case Management Order,
15 which the Court denied, and do not bear on this privilege dispute. Plaintiffs’ motion
16 should be denied in its entirety.

17 **II. RELEVANT BACKGROUND**

18 **A. PLAINTIFFS’ BACKGROUND**

19 Defendants produced their first privilege log on January 12, 2024, and their
20 most recent privilege log (as of the service of Plaintiffs’ portion of this joint
21 stipulation on October 3, 2024), on June 17, 2024. *See* Ex. 2. That log covered
22 documents through Bates number TIKTOK-BG-000153024. *Id.*

23 Defendants produced their first redaction log on January 12, 2024, and their
24 most recent redaction log, (as of the service of Plaintiffs’ portion of this joint
25 stipulation on October 3, 2024), on August 23, 2024. *See* Ex. 3. That log covered
26 documents through bates number TIKTOK-BG-000220390. *Id.*

27 Plaintiff raised concerns about Defendants’ privilege and redaction logs
28 repeatedly. On February 22, 2024, Plaintiffs wrote Defendants to challenge (1) their

1 production of redacted documents that are not reflected on redaction logs, (2) their
2 improper redaction of documents that have no indicia of privilege, and (3) their logs’
3 improper references to “Legal” with no identification of actual attorneys. Exs. 4, 5. In
4 March, Defendants purported to have rectified these defects by (1) re-evaluating their
5 assertions of privilege and either withdrawing in full or in part certain redactions, *see*
6 Ex. 6 (D. Savage Mar. 14, 2024 email), and supplementing their redaction logs with
7 all documents with redactions, *see* Ex. 7 (D. Savage Mar. 25, 2024 email).

8 As Defendants’ document production continued, Plaintiffs learned that
9 Defendants had continued to engage in the same tactics to which Plaintiffs had
10 objected back in February. In fact, the Court can see some of these defects in the
11 sixteen documents for which Plaintiffs seek *in camera* review. *See, e.g.*, Ex. 9 at
12 PRIV-6, PRIV-7, PRIV-10, PRIV-11, PRIV-12. On August 2, 2024, Plaintiffs again
13 wrote to Defendants, noting that Defendants had promised, but failed, to correct
14 deficiencies in their privilege and redaction logs. Ex. 8 (C. Lee Aug. 28 Email). Those
15 deficiencies included withholding and redacting documents without identifying them
16 on a log, redacting comments made by non-attorneys that do not appear to correspond
17 with attorneys, vaguely stating that communications were with “Legal” without
18 identifying the names or positions of actual attorneys, failing to identify recipients of
19 documents, and failing to describe the nature of documents or communications in a
20 manner that would enable Plaintiffs to assess the claim. *Id.*

21 Defendants responded on August 28, doubling down on the purported
22 permissibility for “parties to redact or withhold communications between non-
23 attorneys” and “to identify the source of the privilege as ‘Legal,’” with no attorney
24 names. Ex. 8 (C. Hurley Aug. 28 Email). As to insufficient document descriptions
25 and the lack of recipients identified in logs, Defendants stated their willingness to
26 provide supplemental logs curing these defects. *See id.* Having not heard back from
27 Defendants in a month and with the impending close of fact discovery, on September
28 26, Plaintiffs reached out to Defendants again. *See id.* (J. Rotter Sept. 26 Email).

1 The parties further met and conferred concerning the specific relief requested
2 herein by Plaintiffs on September 30, 2024. Linkh Decl. ¶ 12. During that conference,
3 Defendants stated that they may provide supplemental logs some time the week of
4 October 7. Plaintiffs explained on the call that this would come too late, as discovery
5 closes on October 11 and any discovery motions must be filed to be heard no later
6 than November 1. Given these deadlines, after waiting as long as possible for
7 Defendants' supplemental material and not having received them, Plaintiffs served
8 their portion of this joint stipulation on Defendants on October 3 to be able to file this
9 motion on the last possible date, October 11 (for a November 1 hearing).

10 **B. DEFENDANTS' BACKGROUND**

11 Defendants have reviewed and logged documents for privilege as expeditiously
12 as possible. Since December 2023, Defendants have produced over 280,000
13 documents and served 13 privilege and redaction logs.

14 In February and August, Plaintiffs raised purported concerns with Defendants'
15 redactions and privilege logs. In each instance, Defendants addressed those inquiries
16 thoroughly.

17 **February correspondence.** Plaintiffs' February letter alleged three issues
18 across approximately 45 total documents: (1) inquiries or challenges to certain
19 redactions, (2) so-called failure to log redactions, and (3) log entries "containing
20 references to 'Legal' with no identification of actual attorneys." Defendants agreed
21 to produce all documents as to which Plaintiffs had questions with either no or fewer
22 redactions, to provide an entry for the one remaining unlogged document (which had
23 been inadvertently omitted), and to "supplement[] names for 'Legal' to the extent
24 identifiable," for the two identified documents which retained redactions. Defendants
25 reiterated to Plaintiffs that their efforts to provide names for "Legal" were a courtesy
26 only, and supplied authority (including on August 28) supporting that references to
27 "Legal" are sufficient to sustain a claim of privilege. Following Defendants'
28

1 provision of supplemental log entries in March, Defendants continued to supply
2 privilege and redaction logs without any challenge from Plaintiffs.

3 **August correspondence.** Then, on August 2 (over four months later), Plaintiffs
4 wrote regarding supposed “defects in Defendants’ privilege and redaction
5 logs.” Plaintiffs did not identify any documents or lines of Defendants’ logs they
6 claimed were deficient, but instead described five categories they claimed to be
7 issues: (1) redacting communications between non-lawyers, (2) log entries referring
8 to communications with “Legal”; (3) redacted documents Plaintiffs claimed were
9 unlogged; (4) “fail[ing] to identify the recipients” of documents withheld for
10 privilege; and (5) “fail[ing] to describe the nature of” privileged documents
11 adequately. Defendants again responded comprehensively to each of Plaintiff’s
12 queries. First, Defendants provided case law supporting their redaction and
13 withholding of communications between non-attorneys, and the propriety of log
14 entries identifying the source of the privilege as “Legal.” With respect to “unlogged”
15 documents, no examples of which were provided, Defendants worked with their
16 vendor to triple-check the population of redacted documents and were unable to
17 identify any that had not been logged. Defendants commented that to the extent
18 Plaintiffs were referring to privileged documents post-dating June 1, 2023 (the date
19 the litigation was filed), the parties had agreed no log was necessary. Defendants
20 offered to look into any specific documents Plaintiffs had in mind if they would
21 identify them, offered to clarify with Plaintiffs what additional information if any
22 would be helpful regarding document types, and indicated their willingness to provide
23 a list of “recipients” for documents withheld for privilege. Defendants heard nothing
24 for almost a month.

25 Plaintiffs finally responded on September 26, with sudden urgency after weeks
26 of silence. Referencing a “need to resolve all outstanding issues regarding privilege
27 and redaction logs” before “the impending close of fact discovery”—a time crunch
28 Plaintiffs created by ignoring Defendants for nearly a month—Plaintiffs stated they

1 would seek a blanket privilege waiver over all documents Defendants anticipated
2 including on forthcoming “privilege or redaction logs covering recent productions,”
3 regardless of when served. Tacitly admitting a motion *before* logs were due was by
4 definition premature, Plaintiffs said they would “typically suggest” “a procedure to
5 resolve those issues after the discovery / motion cutoff,” but would “likely need to
6 move” now, to be cautious, “given the Court’s order denying the
7 continuance[.]” Plaintiffs also provided a list of 73 documents they claimed were not
8 logged or for which the privilege claim was inadequately justified and demanded a
9 meet and confer within two business days.

10 The parties met and conferred on September 30. Ex. 34, Hurley Decl. ¶ 2.
11 Defendants stated their intention to provide a privilege log for recently reviewed
12 documents the week of October 7, which they expected to moot most or all of
13 Plaintiffs’ supposed concerns. *Id.* ¶ 4. Defendants also provided explanations for the
14 documents Plaintiffs identified as unlogged or inadequately substantiated. *Id.* ¶
15 4. With respect to the former, Defendants explained the identified documents were
16 Lark messages reproduced as threads at Plaintiffs’ request which had already been
17 produced, redacted, and logged in another format (i.e., as individual Lark chats); post-
18 dated the June 1, 2023 cutoff the parties had agreed upon for logging documents (as
19 also stated a month prior in counsel’s August 28 email); or lacked sufficient metadata
20 to make a determination as to timing. *Id.* ¶ 3. Defendants nevertheless offered to
21 provide supplemental log entries as a courtesy and, with respect to the “unjustified
22 redactions,” Defendants agreed to review the documents identified by Plaintiffs and
23 consider potentially providing more information for Plaintiffs to assess the privilege
24 claim. *Id.* ¶ 5. Defendants stated they would serve the supplemental logs as soon as
25 possible, noting that team members would be observing religious holidays preceding
26 the weekend of October 4-6. *Id.* ¶ 4. In response, Plaintiffs conceded that their
27 planned stipulation was merely a vehicle to preserve potential privilege challenges
28 they may later want to assert. *Id.* ¶ 6. Plaintiffs also did not raise the document clawed

1 back at Becca Wong’s deposition at this meet and confer (which Defendants had
2 reproduced with redactions) and suddenly raised it for the first time in this joint
3 stipulation—*months* later. *Id.* ¶ 7.

4 Defendants did what they promised. As of this filing, Defendants (1) provided
5 Plaintiffs with a privilege log covering all privileged documents Defendants
6 identified and withheld from recent productions, (2) are finalizing a redaction log to
7 be served imminently covering the same population, including entries for documents
8 identified by Plaintiffs that were inadvertently left off of prior logs and redacted Lark
9 chats included on prior logs, but which Defendants had subsequently re-produced as
10 threaded conversations; (3) provided a recipients field for withheld emails and Lark
11 chat threads, exceeding the parties’ agreement (and are willing to do so for redacted
12 documents, *see infra* pp. 32-33); (4) agree to withdraw their assertion of privilege
13 over certain comments by an in-house attorney in a document used at Ms. Wong’s
14 deposition, and (5) produced or agree to produce with no or fewer redactions 3 of the
15 16 documents Plaintiffs claim were over-redacted after further review. Defendants
16 also agree to provide attorney information for entries not otherwise referencing a
17 lawyer (or lawyers) after recipient information was added.

18 **III. LEGAL STANDARD**

19 **A. PLAINTIFFS’ STANDARD**

20 In the Ninth Circuit, an eight-part test governs the determination of whether the
21 attorney-client privilege applies to a particular document. *See United States v. Martin*,
22 278 F.3d 988, 999 (9th Cir. 2002). The privilege applies “(1) When legal advice of
23 any kind is sought (2) from a professional legal adviser in his or her capacity as such,
24 (3) the communications relating to that purpose, (4) made in confidence (5) by the
25 client, (6) are, at the client’s instance, permanently protected (7) from disclosure by
26 the client or by the legal adviser (8) unless the protection be waived.” *Id.* The party
27 asserting the privilege bears the burden of showing it applies. *Id.* Accordingly, the
28 privilege will not apply where the asserting party cannot demonstrate these eight

1 elements. *Baxter Healthcare Corp. v. Fresenius Med. Care Holding, Inc.*, 2008 WL
2 5214330, at *2 (N.D. Cal. Dec. 12, 2008); *Martin*, 278 F.3d at 999. “Because it
3 impedes full and free discovery of the truth, the attorney-client privilege is strictly
4 construed.” *Martin*, 278 F.3d at 999 (citation omitted).

5 “To qualify for the work product protection,” Defendants “must demonstrate
6 the documents were prepared in anticipation of litigation or for trial.” *Centerline*
7 *Hous. P’ship I, L.P.-Series 2 v. Palm Communities*, 2021 WL 4895746, at *9 (C.D.
8 Cal. Sept. 2, 2021).

9 When a party withholds information from discovery on the basis of attorney-
10 client privilege or work-product protection, “the party must (i) expressly make the
11 claim; and (ii) describe the nature of the documents, communications, or tangible
12 things not produced or disclosed—and do so in a matter that, without revealing
13 information itself privileged or protected, will enable other parties to assess the
14 claim.” Fed. R. Civ. P. 26(b)(5)(A).

15 Blanket assertions of privilege are insufficient. *Brunswick Corp. v. Doff*, 638
16 F.2d 108, 110 (9th Cir. 1981); *Maki v. United States*, 2008 WL 1756330, at *4 (W.D.
17 Va. Apr. 16, 2008) (“bald assertion that certain documents were ‘prepared at the
18 request’ of counsel . . . does not meet its burden of establishing that these documents
19 are privileged from discovery under the attorney-client privilege”). “Rather, the
20 party’s privilege log ‘must set forth specific facts which, taken as true, establish the
21 elements of the privilege for each document for which privilege is claimed.’” *Johnson*
22 *v. Ford Motor Co.*, 309 F.R.D. 226, 232-33 (S.D. W.Va. 2015); *see also Victor*
23 *Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 264 (D. Md. 2008) (privilege logs
24 typically require “information regarding the nature of the privilege/protection
25 claimed, the name of the person making/receiving the communication, the date and
26 place of the communication, and the document’s general subject matter.”).

27 And the mere fact that “an attorney” is “one of several recipients” is not
28 sufficient to distinguish the documents withheld from “ordinary business

communications, to which privilege does not apply.” *Applied Med. Resources Corp. v. Ethicon, Inc.*, 2005 WL 6567355, at *2 (C.D. Cal. May 23, 2005); *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) (“That a person is a lawyer does not, ipso facto, make all communications with that person privileged.”); *Wisk Aero LLC v. Archer Aviation Inc.*, 2022 WL 524065, at *4 n.3 (N.D. Cal. Feb. 22, 2022) (“As in-house counsel, Bibbes’s communications may include ‘dual-purpose communications,’ involving ‘both legal and non-legal analyses.’”) (quoting *In re Grand Jury*, 23 F.4th 1088, 1092 (9th Cir. 2021)); *United States v. Chevron Corp.*, 1996 WL 264769, at *4 (N.D. Cal. Mar. 13, 1996) (“a corporation must make a **clear showing** that in-house counsel’s advice was given in a professional legal capacity” (emphasis in original)).

B. DEFENDANTS’ STANDARD

Under Federal Rule of Civil Procedure 26(b)(5), there is “no *per se* waiver rule when a privilege log is not produced.” *Mayorga v. Ronaldo*, 2023 WL 8047781, at *3 (9th Cir. Nov. 21, 2023) (citing *Burlington N. & Santa Fe R.R. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1147-49 (9th Cir. 2005)). Nor is there *per se* waiver when documents have been inadvertently omitted from prior logs, or where the logs contain insufficient information to assess the privilege claim. *See United States v. Union Pac. R. Co.*, 2007 WL 1500551, at *3 (E.D. Cal. May 23, 2007).

Courts in the Ninth Circuit rather analyze whether privilege has been waived on a case-by-case basis “in the context of a holistic reasonableness analysis.” *Am. Fed’n of Musicians v. 212 Prods. LLC*, 2022 WL 2102868 (C.D. Cal. Sep. 27, 2021) (citing *Burlington*, 408 F.3d at 1149). The case-by-case determination considers several factors, including: “the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged . . .; the timeliness of the objection and accompanying information about the withheld documents . . .; the magnitude of the document production; and other particular circumstances of the litigation that make

1 responding to discovery unusually easy . . . or unusually hard.” *Calendar Research*
2 *LLC v. Stubhub, Inc.*, 2019 WL 1581406, at *4 (C.D. Cal. Mar. 14, 2019).

3 The attorney-client privilege encompasses and protects confidential
4 communications requesting, providing, or reflecting legal advice, *see Gibson v. Reed*,
5 2019 WL 2372480, at *1 (W.D. Wash. June 5, 2019), while the work product doctrine
6 protects from disclosure communications or materials prepared in anticipation of
7 litigation. *See Munguia-Brown v. Equity Residential*, 337 F.R.D. 509, 516 (N.D. Cal.
8 2021). An attorney need not be an author or recipient of a communication for it to be
9 privileged; the privilege protects, for example, communications between two non-
10 lawyers discussing or concerning legal advice provided by counsel. *See In re Abilify*
11 *(Aripiprazole) Prod. Liab. Litig.*, 2017 WL 6757558, at *6 (N.D. Fla. Dec. 29, 2017)
12 (collecting cases). Log entries must include information sufficient to sustain a claim
13 of privilege. *See LD v. United Behav. Health*, 2022 WL 4878726, at *2 (N.D. Cal.
14 Oct. 3, 2022). Even where a privilege log is deficient or untimely served, the remedy
15 is generally an order to supplement the affected entries—not waiver. *See United*
16 *States v. Union Pac. R. Co.*, 2007 WL 1500551, at *3 (E.D. Cal. May 23, 2007);
17 *Humphreys v. Regents of the Univ. of California*, 2006 WL 1409336, at *1 (N.D. Cal.
18 May 23, 2006) (no waiver where there is “sufficient information to constitute a good
19 faith effort at compliance”).

20 **IV. ARGUMENT**

21 **A. PLAINTIFFS’ ARGUMENT**

22 **1. Defendants Waived Any Applicable Privilege by Failing to** 23 **Produce Logs in a Timely Manner.**

24 “The law is well settled that failure to produce a privilege log or production of
25 an inadequate privilege log may be deemed waiver of the privilege.” *Anaya v. CBS*
26 *Broad., Inc.*, 251 F.R.D. 645, 651 (D.N.M. 2007); *see also Burlington N. & Santa Fe*
27 *Ry. Co. v. U.S. Dist. Ct. for Dist. Of Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005)
28 (affirming district court’s finding of waiver where privilege log filed five months after

1 the Rule 34 time limit of 30 days). It is necessary to find waiver where a privilege log
2 is updated only in response to a motion to compel “to prevent gamesmanship.”
3 *Robinson v. Texas Auto. Dealers Ass’n*, 214 F.R.D. 432, 456 (E.D. Tex. 2003), *rev’d*
4 *on other grounds*, 2003 WL 21911333 (5th Cir.)). “If a party is allowed to withhold
5 documents without giving opposing parties notice that the documents exist but are
6 being withheld, the opposing party will obviously be unable to contest the validity of
7 a privilege or protection asserted for those documents.” *Id.* “Amending the privilege
8 log to fully disclose the scope of withheld documents after a motion to compel
9 documents in the privilege log has already been filed is too late to serve that purpose.
10 If the existence of all the documents that would be most enticing to the opposing party
11 is not known, no motion to compel may ever be filed.” *Id.*

12 Defendants have failed to produce logs corresponding to documents withheld
13 for the majority—approximately 93% of pages—of their production. “A party waives
14 the attorney-client privilege and work-product protection when it fails to give notice
15 in its privilege log that a document is being withheld based on a privilege or protection
16 as required.” *Fidelity Nat. Title Ins. Co. v. Captiva Lake Investments, LLC*, 2012 WL
17 3562207, at *3 (E.D. Mo. Aug. 17, 2012) (holding privilege waived where party failed
18 to include reports in its initial privilege log, and the assertion of the privilege was
19 only made at a deposition). Here, Plaintiffs have already taken the depositions of fact
20 witnesses and/or 30(b)(6) corporate representatives Becca Wong, Branky Shao,
21 Daniel Kirschgessner, Lizzie Li, Simran Sahni, Sheraz Amin, and Yun-Feng Wei. All
22 but Amin’s deposition were taken before Defendants’ produced logs covering 93% of
23 pages of their production. In other words, Plaintiffs were forced to take nearly all of
24 their fact depositions, and all 30(b)(6) depositions, before Defendants produced the
25 vast majority of the documents in this case—in blatant violation of their promise to
26 the Court to produce documents in approximately equal amounts every three weeks
27 and not dump documents near the end of the discovery period. *See* Dkt. 134 at 13-14.

28 To add insult to injury, this eleventh-hour document dump also means that

1 Plaintiffs, the week before the close of fact discovery, still have not seen any
2 corresponding privilege or redaction logs of documents that were withheld or redacted
3 in the massive production. To the extent that Defendants' gamesmanship and
4 violation of the parties' production schedule has prevented Plaintiffs from an
5 opportunity to review logs and challenge any improperly withheld or redacted
6 documents, the Court should find that Defendants have waived any applicable
7 privilege due to their unreasonable delays.

8 **2. Defendants Failed to Provide Logs for Certain Redactions and**
9 **Thus Waived Privilege.**

10 Defendants also failed to provide redaction logs for at least the following
11 documents with redactions that Plaintiffs were able to identify so far:

12 TIKTOK-BG-000146628
13 TIKTOK-BG-000147494
14 TIKTOK-BG-000147604
15 TIKTOK-BG-000149159
16 TIKTOK-BG-000149962
17 TIKTOK-BG-000150824
18 TIKTOK-BG-000157659
19 TIKTOK-BG-000168183
20 TIKTOK-BG-000168423
21 TIKTOK-BG-000151144

22 Linkh Decl. ¶ 19. To be clear, there were numerous other documents with redactions
23 that Defendants never logged that Plaintiffs nonetheless have, in good faith, left off
24 from the above list because those documents reflected involvement of legal counsel.
25 As Plaintiffs have explained on numerous occasions to Defendants, given the format
26 in which Defendants have produced documents, Plaintiffs do not have a systematic
27 way of identifying all documents produced with redactions to cross-reference them
28 against Defendants' redaction logs.¹ Rather, Plaintiffs must go through Defendants'

¹ The fact that Defendants have been producing redaction logs piecemeal and in PDF,
rather than producing a running list in Excel, also increases the burden on Plaintiffs.

1 documents one by one, see which ones have redactions, and then check them against
2 the redaction logs to verify that documents with redactions are reflected on one of the
3 logs. By contrast, Defendants or their discovery vendor must surely have a list of
4 documents that they have redacted. Notwithstanding this information asymmetry,
5 Defendants have always placed the burden on Plaintiffs to identify documents with
6 redactions that are not reflected in the redaction logs.

7 During the parties' September 30, 2024 meet and confer, Defendants stated that
8 they had logged individual portions of chat threads when those individual portions
9 were produced separately, but had not logged the documents reflecting the threaded
10 chat messages. This excuse makes no sense for at least two reasons. First, some of the
11 documents with redactions that have never been logged are not chats but rather are
12 technical documents. Second, even as to chats, Defendants well know that the
13 fragmented, individual chat messages (which they claim to have logged) were
14 unreviewable, which is why Defendants agreed to re-produce them as threads in the
15 first place. Plaintiffs have no way to correlate the purported redaction log entries for
16 each fragmented, individual chat message with the threaded chat documents with
17 redactions for which Defendants have admittedly served no logs.

18 The Court should hold that Defendants have waived the privilege as to these
19 documents. *See Robinson*, 214 F.R.D. at 456; *Fidelity*, 2012 WL 3562207, at *3
20 ("Fidelity failed to include the Major Claims Reports in its initial privilege log, an
21 omission for which it offers no explanation. . . . Fidelity has waived any claim of
22 privilege with respect to the Major Claims Reports."). In the alternative, Plaintiffs are
23 prepared to submit a subset of these documents for the Court's *in camera* review.

24 **3. Defendants' Descriptions of Privilege Are Patently**
25 **Insufficient and Do Not Enable Plaintiffs to Assess the Claims.**

26 Equally troubling as the documents withheld or redacted without being logged
27 are the inadequate descriptions of privilege in the logs that were produced by
28 Defendants. The privilege and redaction logs are deficient in at least three ways:

(1) the generic descriptions of privilege do not “enable other parties to assess the claim,” as required by Rule 26(b)(5)(A), (2) the entries contain no information regarding the recipients of these purportedly privileged documents, and (3) many entries do not reference a lawyer at all but reference only “Legal” or only “legal advice” without any further description.

The following are examples of entirely generic, nonspecific descriptions of privilege littered throughout Defendants' logs:

[illegible]

“Pixel,” “data storage,” and “cookies” are what this entire case is about; descriptions of privilege that merely state that some document reflects legal advice about the “Pixel,” without more, is wholly inadequate to enable Plaintiffs to determine whether documents are indeed properly withheld. What is even more problematic is that none of the entries identify a lawyer by name. (Defendants stated that they denoted lawyers

1 on their logs by bolding their names. No names are in bold above.)

2 The issue of inadequate privilege descriptions is compounded by the fact that
3 Defendants failed to include a “Recipient” column in their logs. As a concrete
4 example, TIKTOK-BG-000118404 was withheld entirely for privilege and was
5 described as an “email chain requesting legal advice regarding data processing” in
6 Defendants’ April 15, 2024 Supplemental Privilege Log. *See* Ex. 2, page 3, line 1.
7 The specific entry listed Deep Shah, Jimmy Marrow, and Manan Jhamb as the authors
8 of the document, but none of them are attorneys. Because no information is provided
9 regarding the recipient of this document, Plaintiffs are unable to determine who these
10 nonlawyer individuals were purportedly seeking legal advice from and whether the
11 document is in fact privileged. Plaintiffs are also unable to assess whether any logged
12 documents were shared with a third party, which would waive any privilege.

13 Although Defendants have indicated that they would supplement their logs to
14 provide such information, Defendants have not done so as of the date that Plaintiffs
15 served their portion of this Joint Stipulation. Accordingly, Defendants have waived
16 their right to assert any privilege over these withheld documents. *See S.E.C. v.*
17 *Yorkville Advisors, LLC*, 300 F.R.D. 152, 162-168 (S.D.N.Y. 2014) (holding that
18 SEC’s initial privilege logs in civil enforcement action failed to provide adequate
19 description of subject matter, authors, and recipients of withheld documents, thus
20 resulting in waiver of any applicable privilege, and refusing to consider untimely
21 revised privilege logs). To the extent that there are entries that do not identify any
22 lawyer in the custodian, author, or description fields and that also suffer from generic,
23 insufficient descriptions of purported privilege, Plaintiffs request that the Court order
24 these documents to be produced. In the alternative, Plaintiffs request that the Court
25 order Defendants to provide them for *in camera* review.

26 **4. Improper or Unjustified Redactions Do Not Bear Any Facial**
27 **Indicia of Privileged Materials.**

28 **a. Documents that Do Not Involve an Attorney**

1 The attorney-client privilege protects confidential disclosures made by a client
2 to an attorney in order to obtain legal advice, as well as an attorney’s advice in
3 response to such disclosures. *Baxter*, 2008 WL 5214330, at *2 (citation omitted). The
4 privilege is limited to “only those disclosures—necessary to obtain informed legal
5 advice—which might not have been made absent the privilege.” *Id.* Accordingly, at
6 minimum, a privilege log must identify “the attorney and client involved.” *In re*
7 *Telescopes Antitrust Litig.*, 2022 WL 17331257, at *2 (N.D. Cal. Nov. 29, 2022)
8 (quoting *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992))
9 “Suffice it to say that for each privilege claim, the privilege log should disclose the
10 attorney and client involved in the communication.” *Id.* at *4; *see also In re Google*
11 *RTB Consumer Priv. Litig.*, 2022 WL 17072016, at *5 & n.3 (N.D. Cal. Nov. 17,
12 2022) (ordering Google to provide supplemental information as to 18 disputed
13 privilege log entries, including “the attorney(s) involved” and specifying that the
14 “disclosures should identify an individual or individuals, not ‘Google,’ if known”).²

15 Numerous entries in Defendants’ privilege logs do not meet the basic
16 requirement of identifying the attorneys involved in the purported claim of privilege.
17 For example, the chart of sample entries discussed above, *see supra* Section IV.A.3,
18 contains no reference to attorneys anywhere. As additional examples, PRIV-7, PRIV-
19 9, PRIV-10, PRIV-11, PRIV-12, PRIV-13, PRIV-14, PRIV-15, and PRIV-16
20 (attached as Exs. 21, 23-30), for which Plaintiffs request *in camera* review, also do
21 not mention any attorneys in the entries.

22 Likewise, to qualify for work product protection, Defendants “must
23 demonstrate the documents were prepared in anticipation of litigation or for trial.”
24 *Centerline*, 2021 WL 4895746, at *9. Certain entries in Defendants’ privilege logs

25 _____
26 ² In the rare case in which a court accepted privilege log entries without a specific
27 attorney identified, the log entry otherwise made it “evident that the information being
28 compiled or discussed by corporate employees was information requested by or
generated by an attorney.” *In re Abilify (Aripiprazole) Prod. Liab. Litig.*, 2017 WL
6757558, at *6 (N.D. Fla. Dec. 29, 2017). That is not the case here.

1 claim “work product” privilege without identifying any litigation or trial for which
2 the documents were supposedly prepared:

3	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
4	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
5	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
6	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
7	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
8	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
9	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
10	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
11	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
12	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

13
14 Defendants have even redacted documents that reflect conversations between
15 [REDACTED]. PRIV-15 (Ex. 31) and Ex. 33 are two such
16 documents. Defendants didn’t even bother logging Ex. 33 at all notwithstanding the
17 redactions in the document. As to PRIV-15, Defendants claim that the redacted
18 portions reflect “legal advice from Legal regarding data access.” Ex. 3 at 23-24. But
19 the redacted portions were written by an [REDACTED] author, which Plaintiffs suspect
20 is the [REDACTED]. Defendants cannot reasonably claim that any privileged communications
21 occurred between a bot and non-attorneys. The fact that Defendants have nonetheless
22 done so reflect Defendants’ legally unjustifiable understanding of privilege and their
23 improper withholding of documents on that basis.

24 **b. Documents that Involve an Attorney but Relate to**
25 **Business, Not Legal Matters**

26 It is black-letter law that “[c]ommunications which relate to business rather
27 than legal matters do not fall within the protection of the privilege.” *Leonen v. Johns-*
28 *Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990). In order to show that a communication

1 relates to legal advice, the proponent of the privilege must demonstrate that the
2 “primary purpose” of the communication was securing legal advice. *United States v.*
3 *Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002); *see also Visa*
4 *U.S.A., Inc. v. First Data Corp.*, 2004 WL 1878209, at *4 (N.D. Cal. Aug. 23, 2004)
5 (rejecting a “because of” standard and applying a “primary purpose” standard). A
6 defendant must “distinguish between legal advice, which is privileged, and advice
7 concerning matters of business strategy that happens to be provided by a lawyer,
8 which is not.” *In re Napster, Inc., Copyright Litig.*, 2005 WL 6569723, at *5 n.1.
9 (N.D. Cal. Apr. 12, 2005), *rev’d on other grounds*, 479 F.3d 1078, 1090 (9th Cir.
10 2007). Importantly, “[w]here there are several possible interpretations of a document
11 based upon the surrounding circumstances, the party asserting the privilege must
12 produce evidence sufficient to satisfy a court that legal, not business, advice is being
13 sought.” *Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, 2006 WL
14 1004472, at *6 (S.D.N.Y. Apr. 18, 2006).

15 Privilege does not attach to communications merely because an attorney was
16 involved—that attorney must be acting in counsel’s professional capacity as a lawyer
17 for the corporation and providing legal advice for the privilege to apply. *See Chevron*,
18 1996 WL 264769, at *4 (noting a company must “make a clear showing that in-house
19 counsel’s advice was given in a professional legal capacity”); *Phillips v. C.R. Bard,*
20 *Inc.*, 290 F.R.D. 615, 630 (D. Nev. 2013) (“the court agrees that merely copying or
21 ‘cc-ing’ legal counsel, in and of itself, is not enough to trigger the attorney-client
22 privilege”); *Clavo v. Zarrabian*, 2003 WL 24272641, at *2 (C.D. Cal. Sep. 24, 2003)
23 (“The mere transmittal of documents to a lawyer is insufficient to bring documents
24 under the umbrella of the attorney-client privilege.”).

1 Defendants have redacted or withheld numerous documents that were
2 apparently created primarily for business purposes and not to communicate or seek
3 confidential legal advice. For instance, PRIV-06 (Ex. 20) is a document titled [REDACTED]
4 [REDACTED] which plainly is a [REDACTED] document not created for the
5 primarily purpose of seeking legal advice. Yet, Defendants redacted a snippet of the
6 document and claimed that the redacted portion is “legal advice regarding cookies”
7 from in-house counsel Jurgen Van Staden:

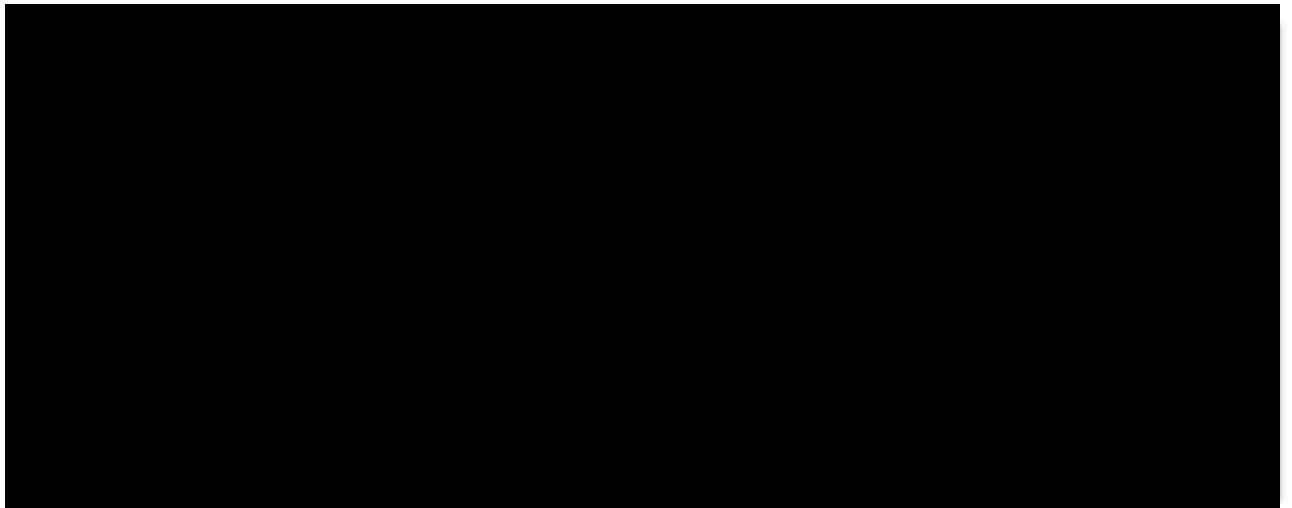
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 See Ex. 3, also reproduced at Ex. 9. There is no indication from the face of the
12 document that the redacted portion is legal advice. Even the comment in the document
13 in the vicinity of the redaction makes clear that whatever was redacted was a [REDACTED]
14 [REDACTED]—i.e. a decision by [REDACTED] And even if the
15 redacted portion is indeed a comment from Mr. Van Staden, it is clear that this
16 document was created primarily for business purposes, and therefore, not protected
17 by the attorney-client privilege. TikTok has failed to “make a clear showing that in-
18 house counsel’s advice was given in a professional legal capacity.” *Chevron*, 1996
19 WL 264769, at *4.
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1 TIKTOK-BG-000168981 (Chinese version attached as Exhibit 27; English
2 translation as Exhibit 28) is another example of Defendants' improper redaction. The
3 document, titled [REDACTED] is, on its face, a
4 [REDACTED] document created primary for a business, not legal, purpose. Yet Defendants
5 redacted comments on page 44 of the document (or page 47 in the translated version
6 of the document) made by [REDACTED], none of whom were
7 identified as lawyers on Defendants' logs.

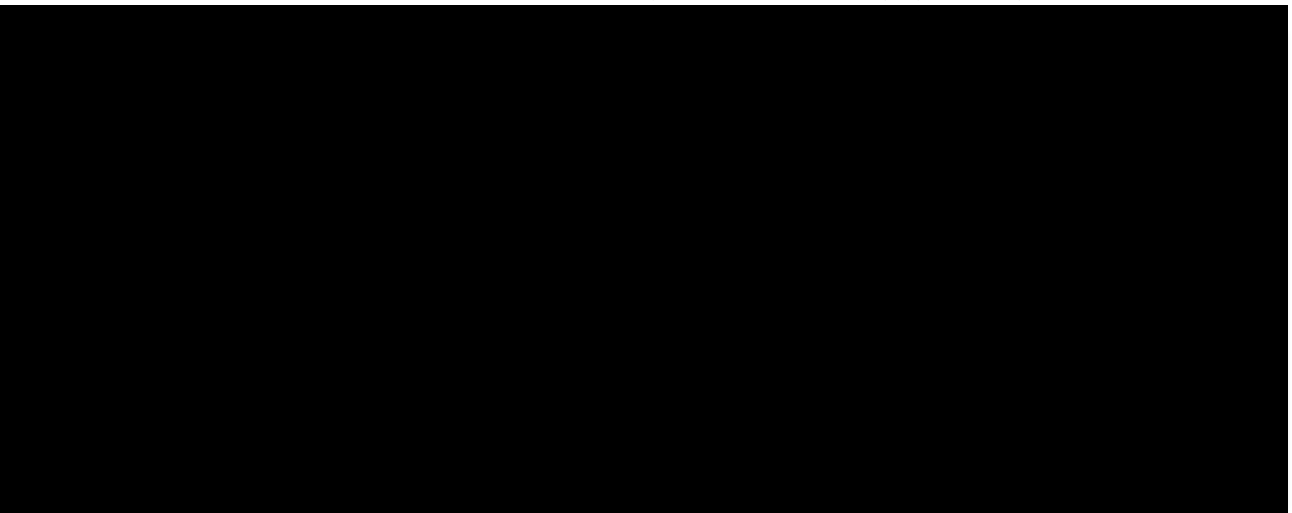
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 Further, Defendants failed to log the document in their redaction logs altogether,
19 leaving Plaintiffs' with no way to evaluate whether the redactions are indeed
20 privileged.

21 Perhaps the two strongest pieces of evidence that Defendants have improperly
22 withheld or redacted non-privileged documents come from (1) the same document of
23 which Defendants have produced different versions with *different redactions* and
24 (2) a clawback request that Defendants sought to make during a deposition.

1 First, after Plaintiffs challenged the propriety of Defendants’ redactions in
2 February, they “reevaluated some of [their] privilege determinations” and re-
3 produced certain documents with no or fewer redactions. *See* Ex. 6 (D. Savage Mar.
4 14 Email). The redactions that Defendants originally made and then withdrew reveal
5 that Defendants’ representations about their withheld documents are false. Compare,
6 for example, a document that Defendants originally produced with redactions, under
7 the guise of “legal advice regarding Events API,” with an unredacted version of the
8 same:

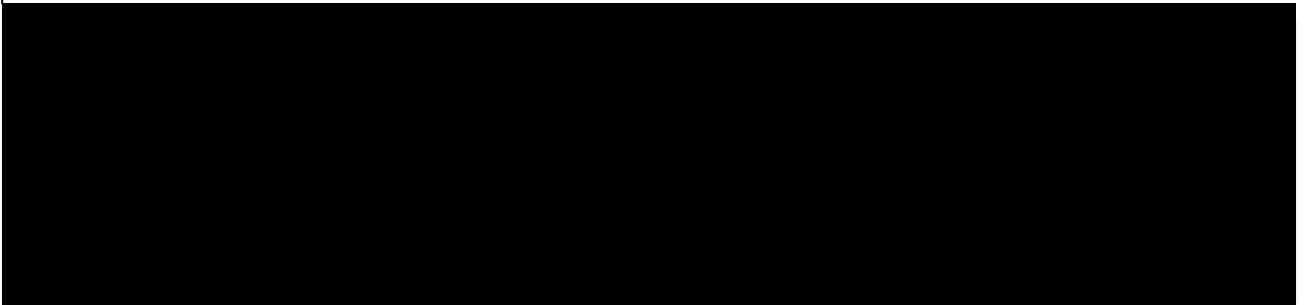


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14
15
16 **TIKTOK-BG-000009259 (with redaction) (Ex. 17)**

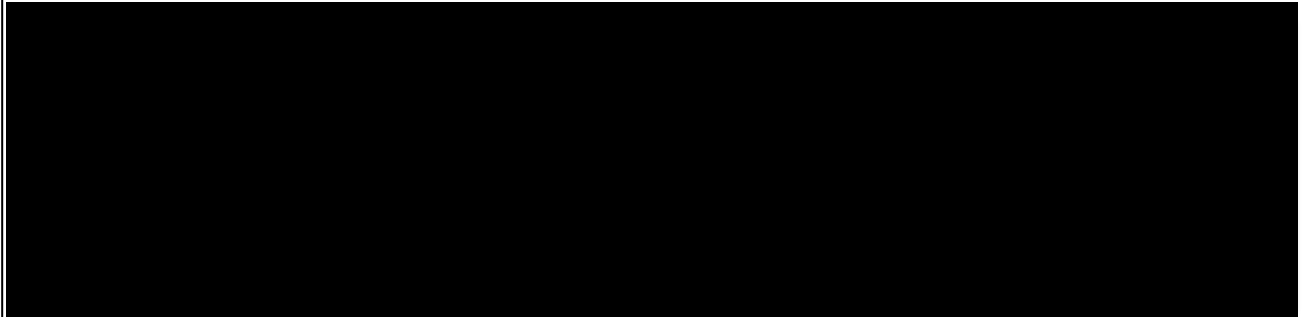


17
18
19
20
21
22
23
24
25 **TIKTOK-BG-000009259 (without redaction) (Ex. 18)**

26 Consider another example, which Defendants originally redacted as “legal advice
27 regarding cookies”:
28



TIKTOK-BG-000009045 (with redaction) (Ex. 14)



TIKTOK-BG-000009045 (without redaction) (Ex. 15)

There was nothing privileged about the portions of these documents that Defendants originally redacted. Further, these are documents on the core issue of this case: how Defendants use cookies to collect data from unwitting non-TikTok users, how long Defendants can store such data, and the consent required by law to use such cookies. That Defendants are attempting to shield bad relevant facts from disclosure is severely prejudicial to Plaintiffs.

Second, yet another example of Defendants' improper privilege assertion is the privilege dispute that came up during Becca Wong's deposition, when Defendants attempted to claw back portions of a document—namely, a Q&A to aid TikTok employees in answering questions about the Pixel from advertisers. TikTok sought to claw this document back because it contained two comment exchanges between in-house counsel Mr. Van Staden and non-lawyer Ms. Wong:

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[REDACTED]

TIKTOK-BG-000002638, Comment C44

[REDACTED]

TIKTOK-BG-000002638, Comment C65

Ex. 10 (clawback letter); Ex. 11 (slipsheet of TIKTOK-BG-000002638).³

The comments are plainly not privileged. [REDACTED]

[REDACTED]

[REDACTED] These are technical communications not involving any legal advice and are not privileged. *See e.g., Genentech, Inc. v. Trustees of Univ. Pennsylvania*, 2011 WL 5079531, at *2 (N.D. Cal. Oct. 24, 2011) (communications from in-house

³ Defendants produced this document as an Excel spreadsheet that cannot readily be saved in a PDF format that also preserves the comment exchanges at issue. Plaintiffs are happy to submit the spreadsheet to the Court by email or another mechanism at the Court’s preference and convenience.

1 counsel regarding intellectual property were not privileged because their purpose was
2 to “secure information for the purpose of presenting a business case to the Board of
3 Directors”); *Veolia Water Sols. & Techs. Support v. Siemens Indus., Inc.*, 63 F. Supp.
4 3d 558, 569 (E.D.N.C. 2014) (privilege claim invalid where document does not
5 “suggest that legal advice is being sought, as opposed to providing the document for
6 other corporate or intellectual property management purposes”); *In re Human Tissue*
7 *Prod. Liab. Litig.*, 2009 WL 1097671, at *4 (D.N.J. Apr. 23, 2009) (communications
8 regarding “business and strategic advice” are not privileged); *In re Viacx Prod. Liab.*
9 *Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (“[M]odern corporate counsel have
10 become involved in all facets of the enterprises for which they work. As a
11 consequence, in-house legal counsel participates in and renders decisions about
12 business, technical, scientific, public relations, and advertising issues, as well as
13 purely legal issues.”). Not only is Defendants’ attempt to claw back this document
14 improper, but the fact that Defendants apparently believe this document to be
15 privileged provides further evidence of their false assertions of privilege more
16 generally.

17 **5. Defendants’ Clawback Attempt Is Improper.**

18 For the reasons articulated above, *see supra* Section IV.A.4.b, Defendants’
19 attempt to claw back the spreadsheet is improper. The Court should reject the attempt
20 and declare that the document is not privileged.

21 **B. DEFENDANTS’ ARGUMENT**

22 Defendants produced on October 10 a privilege covering all documents
23 reviewed and withheld for privilege since the last logs were served in
24 August. Defendants expect to provide a redaction log covering the same population
25 imminently. The logs were (or will be) provided as soon as Defendants finished
26 reviewing the associated documents for privilege.⁴ As such, Defendants did not
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28 ⁴ Plaintiffs quote *their own* previous filing as a factual source for their inaccurate

1 “fail[] to produce logs corresponding to documents withheld for the majority . . . of
2 their production” (Br. at 15), and there can be no waiver. *Calendar Research LLC*,
3 2019 WL 1581406, at*4. Indeed, Plaintiffs do not even discuss the standard for
4 waiver in the Ninth Circuit, and the (mostly out-of-circuit) authority they do cite is
5 hardly compelling. No case Plaintiffs reference finds waiver with respect to
6 documents included on a privilege log in the ordinary course, and in fact, some
7 counsel the opposite result. See *Burlington N. & Santa Fe R.R. Co. v. U.S. Dist.*
8 *Court*, 408 F.3d 1142, 1147-49 (9th Cir. 2005) (finding of waiver not clearly
9 erroneous where log filed five months late; the same documents were previously
10 produced in a prior lawsuit, undermining any claim of burden; and “even the untimely
11 assertion . . . was insufficient”); *Anaya v. CBS Broad., Inc.*, 251 F.R.D. 645, 653
12 (D.N.M. 2007) (no waiver even where proponent “might have done a better job
13 supporting their assertion of privilege . . . in their privilege logs” and, despite serving
14 “multiple privilege logs” that were “inadequat[e],” the logs were “produced in good
15 faith”); *Fidelity Nat’l Title Ins. Co. v. Captiva Lake Invs., LLC*, 2012 WL 3562207,
16 at *3 (E.D. Mo. Aug. 17, 2012) (proponent excluded entire category of in-house
17 lawyer’s “major claims reports” from privilege log until after his deposition, offering
18 “no explanation” for the omission); *Robinson v. Texas Auto. Dealers Ass’n*, 214
19 F.R.D. 432, 455 (E.D. Tex. 2003) (applying standard disapproved of by Ninth Circuit
20 in *Burlington* and documents were “not listed” in the original privilege log at all); cf.
21 *Bullion Monarch Mining, Inc. v. Newmont USA Ltd.*, 271 F.R.D. 643, 649 (D. Nev.
22 2010) (only concluding waiver appropriate where party had never produced a log
23 “[s]even months after the close of discovery”). Nor does any of Plaintiffs’ authority

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26 recitation of the parties’ discussions regarding document production and
27 discovery. Br. at 1, 15 (citing Dkt. 134). Assertions presented as objective facts
28 which in actuality come from Plaintiffs’ one-sided retelling in another filing should
be disregarded as unsupported.

1 find waiver because privilege or redaction logs were served “the week before the close
2 of fact discovery.” Br. at 16.

3 Plaintiffs take issue with privilege logs being updated “only in response to a
4 motion to compel” (Br. at 15), but that is not what happened. The instant logs were
5 served in the ordinary course, as Defendants told Plaintiffs they would be on
6 September 30. Ex. 34, Hurley Decl. ¶ 4.

7 Plaintiffs note that the October logs were served after certain depositions of
8 fact witnesses and/or 30(b)(6) corporate witnesses. Br. at 15-16. That too, standing
9 alone, is not a basis for waiver. Plaintiffs’ arguments regarding the timing of
10 Defendants’ production, an effort to revive issues the Court considered in denying
11 their motion to extend the Case Management Order, are a red herring. The population
12 relevant to this motion is *privileged* documents, which comprises thousands of log
13 entries, not the millions of pages Plaintiffs invoke. To the extent Plaintiffs have any
14 questions with respect to the discrete set of privileged documents appearing on the
15 October logs for witnesses who were previously deposed (and they should not),
16 Defendants will of course consider them in good faith.

17 **2. Defendants Have Not Waived Privilege with Respect to “Unlogged”**
18 **Redacted Documents**

19 Defendants’ forthcoming redaction log will include entries for all redacted
20 documents Plaintiffs identified as purportedly “unlogged.” As explained above, these
21 entries correspond to (1) documents which were inadvertently omitted due to vendor
22 or technical error, and (2) redacted Lark chats which were previously redacted and
23 logged as individual messages, but which Defendants re-produced as consolidated
24 chat threads at Plaintiffs’ insistence, requiring re-redaction.⁵ The supplementation
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26 ⁵ Plaintiffs’ arguments with respect to the technical documents are misleading. As
27 Defendants explained at the September 30 meet and confer, these documents lacked
28 metadata as to the date of creation. Ex. 34, Hurley Decl. ¶ 3. This error has been
remedied.

1 addresses Plaintiffs’ complaint that they cannot “correlate the purported redaction log
2 entries for . . . individual chat message[s] with the threaded chat documents”
3 Defendants re-produced. Br. at 17. Defendants worked in good faith with their
4 vendor to identify and log all redactions during the course of reviewing documents
5 for privilege and applying redactions. Plaintiffs do not cite any authority supporting
6 that waiver arises from inadvertence, or where the documents were logged in another
7 format.

8 The two cases Plaintiffs do cite are inapposite or support Defendants’
9 position. Plaintiffs rely heavily on *Robinson* for the proposition that privilege waiver
10 is required for documents not included on an initial log (or included in supplemental
11 entries following a motion to compel). Br. at 15. *Robinson*, however, turns on an
12 application of Fed. R. Civ. P. 26(b)(5) that the Ninth Circuit rejected in *Burlington*
13 (which Plaintiffs themselves cite elsewhere in their brief). *Compare Robinson*, 214
14 F.R.D. at 456 (finding Fed. R. Civ. P. 26(b)(5) calls for waiver “when the party fails
15 to give notice in its privilege log that a document is being withheld”), *with Burlington*,
16 408 F.3d at 1147-48 (finding Fed. R. Civ. P. 26(b)(5) does not “explicitly articulate a
17 waiver rule” and rejecting a “*per se* waiver rule” for privilege logs served after
18 applicable time limit). *Fidelity*, Plaintiffs’ other case, involved an entire category of
19 documents omitted from a privilege log without explanation; the Court did not discuss
20 inadvertence, nor were the documents previously logged elsewhere. 2012 WL
21 3562207, at *3-4.

22 3. Defendants Have Not Waived Privilege Through “Insufficient” Log 23 Descriptions

24 Plaintiffs complain that Defendants’ privilege descriptions are so inadequate as
25 to require a finding of waiver, pointing in particular to Defendants’ supposed failure
26 to include a “Recipient” column in their privilege logs. Br. at 3, 19. Plaintiffs
27 acknowledge that Defendants “indicated that they would supplement their logs to
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1 provide such information,” an offer Plaintiffs failed to respond to for weeks, and
2 Defendants did so shortly after the parties’ September 30 meet and confer on in the
3 log served on October 10. To the extent attorney information has not been added
4 through the “Recipient” column, Defendants agree to further supplement those entries
5 as soon as practicable. Plaintiffs also ignore that the “Authors” and “Contributors”
6 field on prior logs was populated by the other participants in a Lark chat thread or
7 email chain, *i.e.*, “recipient” information by another name. *See, e.g.*, Ex. 2 at 2-
8 3. There is no waiver under such circumstances; Plaintiffs’ sole case says nothing of
9 the sort. *See S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 162-68 (S.D.N.Y.
10 2014) (logs purported to describe ninety-eight privileged documents in four log
11 entries and supplemental information produced months after specific objections).

12 Plaintiffs take issue with references to “Legal,” *i.e.*, in-house counsel from the
13 legal department, in log entries, but pursuant to the authority Defendants supplied
14 months ago, that is not improper. *See* Ex. 8 (citing *In re Abilify*, 2017 WL 6757558,
15 at *6; *Ball v. USAA Life Ins. Co.*, 2016 WL 11513321, at *4 (D.S.C. May 16, 2016)
16 (same); *Tulip Computers Intern. B.V. v. Dell Computer Corp.*, 2002 WL 31556498,
17 at *1 (D. Del. 2002) (same)). Plaintiffs further contest that privilege descriptions
18 stating a document “reflects legal advice about the ‘Pixel’” are inadequate because
19 the “Pixel,” “data storage,” and “cookies” are what the “case is about.” Br. at
20 19. Unsurprisingly, Plaintiffs supply no authority for the notion that a log description
21 is deficient merely because it concerns the subject of the litigation.

22 **4. In Camera Review is Not Justified.**

23 Plaintiffs’ request for *in camera* review of the 16 documents identified is
24 unwarranted. To start, in the same spirit of good faith cooperation discussed *infra* at ,
25 Defendants are willing to produce versions of TIKTOK-BG-000009921 and
26 TIKTOK-BG-000214719 with fewer redactions and TIKTOK-BG-000215077
27 without redactions. *See* Ex. 9 PRIV-5, PRIV-13 and PRIV-14. For the same reasons
28 including the limited nature, substance, and context of the comments, Defendants no

1 longer seek to claw back the document introduced at the deposition of Becca
2 Wong. For the avoidance of doubt, however, Defendants do not concede that Mr.
3 Van Staden or members of his legal team act in a business capacity, or that documents
4 of this type are “technical” to the extent that term could be understood to preclude the
5 possibility of drafts of technical material being shaped by legal advice.

6 Plaintiffs’ arguments do not warrant *in camera* review of the remaining thirteen
7 documents. Plaintiffs claim *in camera* review is required wherever a specific attorney
8 is not identified by name, but their cases do not say that. *See In re Telescopes*
9 *Antitrust Litig.*, 2022 WL 17331257, at *4 (N.D. Cal. Nov. 29, 2022) (rejecting *in*
10 *camera* review and noting that “indication of the attorney-client relationship need not
11 be set out in each privilege log entry”); *In re Google RTB Consumer Priv. Litig.*, 2022
12 WL 17072016, at *5 (N.D. Cal. Nov. 17, 2022) (“The disclosures should identify an
13 individual or individuals, not ‘Google,’” but only “*if known.*”) (emphasis added).
14 Given the nature of large companies like TikTok and the natural way non-lawyers
15 speak, employees frequently refer to in-house counsel not by name but by calling
16 them “Legal,” *e.g.*, “Legal has instructed us to do X, Y, and Z” or “Legal has asked
17 for X information before providing a response on Y.” Courts permit parties to identify
18 attorneys on privilege logs as “Legal” or the “Legal Department” accordingly. *In re*
19 *Abilify*, 2017 WL 6757558, at *6 (cited by Plaintiffs, Br. at 20 n.2).

20 *In re Abilify*, on which Plaintiffs rely, supports Defendants. As there, the log
21 entries for many of the documents identified by Plaintiffs for *in camera* review make
22 it “evident that the information being compiled or discussed by corporate employees
23 was information requested by or generated by an attorney.” 2017 WL 6757558, at
24 *6. Defendants’ logs reflect, for example, that the communications were made “in
25 furtherance of” seeking or providing legal advice, such as gathering or compiling
26 information as part of a request for legal advice or at the request of an attorney. *See*
27 Ex. 9 at PRIV-08 (TIKTOK-BG-000158578); PRIV-09 (TIKTOK-BG-000163966);
28 PRIV-10 (TIKTOK-BG-000164369); PRIV-13 (TIKTOK-BG-

1 000214719). Plaintiffs also ignore that privilege is not waived (and *in camera* review
2 unnecessary) if legal advice is subsequently reflected in communications between
3 other employees—even if the specific attorney is not directly identified or
4 involved. *See In re Abilify*, 2017 WL 6757558, at *6; Ex. 9 at PRIV-08 (TIKTOK-
5 BG-000158578); PRIV-09 (TIKTOK-BG-000163966); PRIV-10 (TIKTOK-BG-
6 000164369); PRIV-11 (TIKTOK-BG-000164669); PRIV-12 (TIKTOK-BG-
7 000165152); PRIV-15 (TIKTOK-BG-000215413); PRIV-16 (TIKTOK-BG-
8 000215543). Log entries stating that a communication “reflects” advice of counsel
9 from Legal are thus proper too.

10 None of Plaintiffs’ other complaints justify *in camera* review. Plaintiffs argue
11 that Defendants fail to justify the assertion of work-product protection for certain
12 documents, but they do not seek *in camera* review for any of the documents they
13 identify. Br. at 21. In any event, Plaintiffs offer no support for their position that a
14 log must list litigation by name. *Id.*; *see Centerline Hous. P’ship I, L.P.-Series 2 v.*
15 *Palm Communities*, 2021 WL 4895746, at *9 (C.D. Cal. Sept. 2, 2021) (cited by
16 Plaintiffs but concerning documents withheld “solely on the basis of the work product
17 doctrine” and suggesting information as to timing, such as the date of the document,
18 may be sufficient). Plaintiffs also point to two documents they contend reflect
19 automated “bot” messages but fail to acknowledge that such an automated message
20 could originate from the legal department or reflect legal advice, as was the case
21 here. Br. at 21 (citing Exs. 31 (PRIV-15) (“Reflecting legal advice from **Legal**
22 regarding data access”), 33).

23 Finally, Plaintiffs seek *in camera* review of “technical” documents, assuming
24 without basis that such documents by definition must not contain legal advice or that
25 any attorneys commenting on them must be acting in a business capacity. *See* Br. at
26 23; Ex. 9 at PRIV-01 (TIKTOK-BG-000003068), PRIV-02 (TIKTOK-BG-
27 000008030), PRIV-03 (TIKTOK-BG-000009045); PRIV-4 (TIKTOK-BG-
28 000009146); PRIV-6 (TIKTOK-BG-000010053); PRIV-7 (TIKTOK-BG-

000010067). The log entries for these documents, however, identify the attorneys in question and/or indicate that the redacted text reflects legal advice (which Plaintiffs do not dispute). *See* Ex. 9. None of the cases cited by Plaintiffs suggest that properly logged, privileged communications lose protection because they take place in documents that are not traditionally “legal,” or that the nature of the document alone calls into question the validity of a privilege assertion. They rather involve communications that were not privileged to begin with. *See Genentech, Inc. v. Trustees of Univ. Pennsylvania*, 2011 WL 5079531, at *2 (N.D. Cal. Oct. 24, 2011) (communications at issue did not reflect legal advice or questions from an attorney to provide legal advice); *Veolia Water Sols. & Techs. Support v. Siemens Indus., Inc.*, 63 F. Supp. 3d 558, 569 (E.D.N.C. 2014) (same); *In re Human Tissue Prod. Liab. Litig.*, 2009 WL 1097671, at *4 (D.N.J. Apr. 23, 2009) (same); *In re Viacx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (same).

Instead of addressing the merits of Defendants’ privilege assertions for these documents, Plaintiffs point to Defendants’ prior agreement to produce certain *other* technical documents with fewer redactions after further assessment and review of privilege. *See* Ex. 6. For Plaintiffs to leverage Defendants’ efforts to resolve discovery disputes as evidence of wrongdoing is both disappointing and unpersuasive. The original redactions reflect Defendants’ principled and diligent approach to preserve assertions of attorney-client privilege in the early stages of the custodial review; it is hardly uncommon to refine or revisit privilege calls as the case progresses or issues arise. Defendants’ subsequent agreement to adjust those determinations in response to Plaintiffs’ concerns demonstrates good faith, not bad. *See* Ex. 6. Indeed, despite Plaintiffs’ claims of over-designation, Defendants assert privilege over a small fraction of the hundreds of thousands of documents they produced, and despite this sizable volume, Plaintiffs identified only sixteen for *in camera* review. Nothing in the examples Plaintiffs identified calls into question the specified privilege assertions or suggests bad faith. *See* Br. at 25-27 (citing TIKTOK-

1 BG-000009259, TIKTOK-BG-000009045, TIKTOK-BG-000002638).

2 **V. CONCLUSION**

3 **A. PLAINTIFFS' CONCLUSION**

4 In light of the above defects, Plaintiffs respectfully request that the Court order
5 as follows:

6 1. As to documents that were withheld or redacted but not logged by
7 October 3, 2024 (the date Plaintiffs provided their portion of this Joint Stipulation to
8 Defendants), Plaintiffs request an order that Defendants have waived any protections
9 for such documents and must produce them without redactions.

10 2. As to documents that were logged but (1) with no lawyer identified
11 anywhere in the entry and (2) with inadequate descriptions that leave Plaintiffs unable
12 to assess the claim of privilege, Plaintiffs request an order that Defendants have
13 waived any protections for such documents and must produce them without
14 redactions.

15 3. As to documents with redactions but with insufficient justification or that
16 bear no facial indicia of privilege, Plaintiffs request that the Court conduct an *in*
17 *camera* review of 16 such documents to evaluate the claim of privilege. To the extent
18 that the Court deems that any of the documents reviewed have been improperly
19 withheld, Plaintiffs request that the Court order Defendants to produce not just those
20 documents but all substantially similar documents with improper redactions.

21 4. As to the document that Defendants have sought to claw back, Plaintiffs
22 request an order that the clawback attempt is improper and a declaration that the
23 document is not privileged.

24 **B. DEFENDANTS' CONCLUSION**

25 For the foregoing reasons, Plaintiffs are not entitled to the relief sought. Their
26 motion should be denied in its entirety.

1 DATED: October 3, 2024

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